

Rule 14-533.

Rule 14-533. Diversion.

(a) Referral to diversion. In a matter involving less serious misconduct as outlined in subsection (c), upon receipt of an informal complaint and before filing a formal complaint, the respondent may have the option of electing to have the matter referred to diversion, the appropriateness of which will be determined by the chair of the Diversion Committee after consultation with OPC. The option for diversion also may be initiated by OPC or the Ethics and Discipline Committee screening panel. Diversion may require the participation of the respondent in one or more of the following:

- (a)(1) fee arbitration;
 - (a)(2) mediation;
 - (a)(3) law office management assistance;
 - (a)(4) lawyer assistance programs;
 - (a)(5) psychological and behavioral counseling;
 - (a)(6) monitoring;
 - (a)(7) restitution;
 - (a)(8) continuing legal education programs including, but not limited to, ethics school; or
 - (a)(9) any other program or corrective course of action to address the respondent's conduct.
- (b) Diversion Committee.

(b)(1) Composition. Members of the Diversion Committee shall be appointed by the Supreme Court. The committee shall consist of five members, four of whom shall be members of the Bar who have demonstrated a high standard of professional conduct, preferably with at least one Bar member having past experience on the Supreme Court Ethics and Discipline Committee, and one public member with professional training in the area of substance abuse and/or stress management. All appointments shall be for four-year terms with one of the lawyers' terms expiring each year. Committee members shall not serve more than two consecutive terms. The Supreme Court shall designate one of the Bar members as committee chair.

(b)(2) Authority and responsibility. The Diversion Committee may negotiate and execute diversion contracts, assign monitoring to a lawyers assistance program, determine compliance with the terms of diversion contracts, and determine fulfillment or any material breach of diversion contracts, subject to review under subsection (j)(3) of this rule, and adopt such policies and procedures as may be appropriate to accomplish its duties under this rule. The Diversion Committee shall have authority to establish subcommittees of volunteer attorneys and other professionals for the specific purpose of monitoring the compliance of any attorney under diversion and reporting compliance to OPC and the Diversion Committee on a regular basis.

(c) Less serious misconduct. Conduct which would result in a suspension or disbarment is not considered to be less serious misconduct. Conduct is not ordinarily considered less serious misconduct if any of the following considerations apply:

- (c)(1) the misconduct involves the misappropriation of client funds;

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(c)(2) the misconduct results in or is likely to result in substantial prejudice to a client or other person, absent adequate provisions for restitution;

(c)(3) the respondent has been sanctioned in the last three years;

(c)(4) the misconduct is of the same nature as misconduct for which the respondent has been sanctioned in the last three years;

(c)(5) the misconduct involves dishonesty, deceit, fraud, or misrepresentation;

(c)(6) the misconduct constitutes a substantial threat of irreparable harm to the public; a felony; or a misdemeanor which reflects adversely on the respondent's honesty, trustworthiness or fitness as a lawyer; or

(c)(7) the misconduct is part of a pattern of similar misconduct.

(d) Factors for consideration. The Diversion Committee considers the following factors in negotiating and executing the diversion contract:

(d)(1) whether the presumptive sanction that would be imposed, in the opinion of OPC or the Diversion Committee is likely to be no more severe than a public reprimand or private admonition;

(d)(2) whether participation in diversion is likely to improve the respondent's future professional conduct and accomplish the goals of lawyer discipline;

(d)(3) whether aggravating or mitigating factors exist; and

(d)(4) whether diversion was already tried.

(e) Notice to complainant. The OPC will notify the complainant, if any, of the proposed decision to refer the respondent to diversion, and the complainant may submit written comments. The complainant will be notified when the complaint is diverted and when the complaint is dismissed. All notices will be sent to the complainant's address of record on file with the OPC. Such decision to divert or dismiss is not appealable.

(f) Diversion contract.

(f)(1) If the respondent agrees or elects to participate in diversion as provided by this rule, the terms of the diversion shall be set forth in a written contract. If the contract is entered prior to a hearing of a screening panel of the Ethics and Discipline Committee pursuant to Rule 14-510(b), the contract shall be between the respondent and OPC. If diversion is agreed to and entered after a screening panel of the Ethics and Discipline Committee has convened pursuant to Rule 14-510(b), the contract shall be made as part of the decision of that screening panel. ~~As secretary to the screening panel,~~ OPC will memorialize the contract and decision. If diversion is agreed to and entered after a complaint has been filed pursuant to Rule 14-512, the diversion contract shall be made as part of the ruling and order of the Court. Except as otherwise part of an order of a court, the Diversion Committee shall monitor and supervise the conditions of diversion and the terms of the diversion contract. The contract shall specify the program(s) to which the attorney shall be diverted, the general purpose of the diversion, the manner in which compliance is to be monitored, and any requirement for payment of restitution or cost. The respondent attorney shall bear the burden of drafting and submitting the proposed diversion contract. Respondent

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may utilize counsel to assist in the negotiation phase of diversion. Respondent may also utilize Bar benefits programs provided by the Bar, such as a lawyer assistance program to assist in developing terms and conditions for the diversion contract appropriate to that respondent's particular situation. Use of a lawyers assistance program to assess appropriate conditions for diversion shall not conflict that entity from providing services under the contract. The terms of each contract shall be specifically tailored to the respondent's individual circumstances. The contract is confidential and its terms shall not be disclosed to other than the parties to the contract.

(f)(2) All diversion contracts must contain at least all the following:

(f)(2)(A) the signatures of respondent, his counsel if any, and the chair of the Diversion Committee;

(f)(2)(B) the terms and conditions of the plan for respondent and, the identity, if appropriate, of any service provider, mentor, monitor and/or supervisor and that individual's specific responsibilities. If a professional or service is utilized, and it is necessary to disclose confidential information, respondent must sign a limited conditional waiver of confidentiality permitting the professional or service to make the necessary disclosures in order for the respondent to fulfill his duties under the contract;

(f)(2)(C) the necessary terms providing for oversight of fulfillment of the contract terms, including provisions for those involved to report any alleged breach of the contract to OPC;

(f)(2)(D) the necessary terms providing that respondent will pay all costs incurred in connection with the contract and those costs further specified pursuant to subsection (k) and any costs associated with the complaints to be deferred; and

(f)(2)(E) a specific acknowledgement that a material violation of a contract term renders the respondent's participation in diversion voidable by the chair of the Diversion Committee or his designee;

(f)(3) The contract may be amended on subsequent agreement of respondent and OPC.

(f)(4) The chair of the Ethics and Discipline Committee and OPC shall be given copies of every diversion contract entered and signed by the respondent and the Diversion Committee chair.

(g) Affidavit supporting diversion. A diversion contract must be supported by the respondent's or the respondent's lawyer's affidavit or declaration as approved by the Diversion Committee setting forth the purpose for diversion and how the specific terms of the diversion contract will address the allegations raised by the complaint. The respondent is not required to admit to the allegations in the complaint upon entering diversion. However, an admission and/or acknowledgement may be relevant and necessary as part of treatment in diversion. Such an admission shall be confidential for treatment purposes, shall not be released to any third party, and shall not be treated as an admission against interest nor used for future prosecution should diversion fail.

(h) Status of complaint. After a diversion contract is executed by the respondent, the disciplinary complaint is deferred pending successful completion of the contract.

(i) Effect of non-participation in diversion. The respondent has the right to decline to participate in diversion. If the respondent chooses not to participate in diversion, the matter proceeds pursuant to the Rules of Lawyer Discipline and Disability.

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(j) Termination of diversion.

(j)(1) Fulfillment of the contract. The contract terminates when the respondent has fulfilled the terms of the contract and gives the Diversion Committee and OPC an affidavit or declaration demonstrating fulfillment. Upon receipt of this affidavit or declaration, the Diversion Committee and OPC must acknowledge receipt and request that the chair of the Ethics and Discipline Committee or his designee dismiss any complaint(s) deferred pending successful completion of the contract or notify the respondent that fulfillment of the contract is disputed based on an OPC claim of material breach. The complainant cannot appeal the dismissal. Successful completion of the contract is a bar to any further disciplinary proceedings based on the same allegations and successful completion of diversion shall not constitute a form of discipline.

(j)(2) Material breach. A material breach of the contract is cause for termination of the contract. After a material breach, OPC must notify the respondent of the alleged breach and intent to terminate the diversion. Thereafter, disciplinary proceedings may be instituted, resumed or reinstated.

(j)(3) Review by the chair. The Diversion Committee may review disputes regarding the alleged material breach of any term of the contract on the request of the respondent or OPC. The request must be filed with the Diversion Committee chair within 15 days of notice to the respondent of the determination for which review is sought. The respondent is entitled to a hearing before the Diversion Committee on any alleged breach to the diversion contract. Determinations under this section are not subject to further review and are not reviewable in any proceeding.

(k) Costs. Upon entering diversion, respondent shall pay an initial fee of \$250. During diversion, respondent shall pay a fee of \$50 per month. All such fees are payable to the Bar's general fund. These fees may be waived upon a hardship request, the validity or appropriateness of which shall be determined by the chair of the Diversion Committee or his designee.